

Message Text

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SUBJECT: MORRISON KNUDSEN

1. SUMMARY. ARBITRAL PANEL OF THE INTERNATIONAL CHAMBER OF COMMERCE (ICC) IS EXPECTED TO CONVENE WITHIN NEXT FEW MONTHS TO CONSIDER MORRISON-KNUDSEN CLAIM AGAINST THE GOVERNMENT OF PEOPLE'S REPUBLIC OF BENIN (GPRB) RELATING TO THE PARAKOU-MALANVILLE ROAD PROJECT. DUE TO ACCELERATED PACE OF DEVELOPMENTS, OVERSEAS PRIVATE INVESTMENT CORPORATION (OPIC) REQUESTS EMBASSY TO ASCERTAIN RESPONSE OF GPRB TO DIPLOMATIC NOTE ON THIS MATTER AND IN ANY EVENT TO DISCUSS WITH APPROPRIATE GPRB OFFICIALS THE IMPORTANCE OF PARTICIPATING IN ARBITRAL PROCEEDINGS. END SUMMARY.

2. MORRISON-KNUDSEN HAS INVOKED THE ARBITRATION PROVISIONS UNDER ITS CONSTRUCTION CONTRACT WITH GPRB AFTER DISCUSSIONS
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WITH GPRB FAILED TO RESOLVE MORRISON-KNUDSEN CLAIM FOR PAYMENT OF APPROXIMATELY USD 7,500,000 IN OVERRUNS ON ROAD PROJECT. PURSUANT TO ICC RULES MORRISON-KNUDSEN HAS NOMINATED ONE ARBITRATOR, M. DJAMAL LAKHDARI OF ALGERIA, AND ICC HAS MADE SEVERAL ATTEMPTS TO HAVE GPRB NOMINATE THE SECOND ARBITRATOR BY NOTIFYING GPRB THROUGH THE MINISTRY OF PUBLIC WORKS IN BENIN AND THE GPRB EMBASSY IN PARIS. DUE

TO FAILURE OF GPRB TO PICK SECOND ARBITRATOR, ICC IS NOW IN

THE PROCESS OF SELECTING THE SECOND. SELECTION OF THE SECOND WILL BE COMPLETED IN A FEW WEEKS. HOWEVER THERE MAY YET BE TIME FOR GPRB TO NOTIFY THE ICC THAT IT WANTS TO EXERCISE RIGHT TO SELECT A SECOND ARBITRATOR. THE TWO ARBITRATORS WILL THEN SELECT A THIRD AND COMMENCE THE ARBITRATION PROCEEDING.

3. THE ARBITRAL PANEL IS EXPECTED TO COMMENCE HEARING MORRISON-KNUDSEN'S CASE IN PARIS WITHIN THE NEXT FEW MONTHS. EVEN THOUGH GPRB HAS APPARENTLY DECIDED TO WAIVE ITS RIGHT TO SELECT AN ARBITRATOR, GPRB DOES HAVE THE RIGHT TO PARTICIPATE AND DEFEND ITSELF IN THE ARBITRATION. IN FACT, IT CAN BE ANTICIPATED THAT THE ICC WILL ENCOURAGE GPRB TO PRESENT ITS CASE BEFORE THE ARBITRAL PANEL AS IT IS ALWAYS PREFERABLE TO HAVE BOTH SIDES TO A DISPUTE PRESENT SO THAT BOTH SIDES OF THE ISSUE WILL BE WELL PRESENTED. HOWEVER EVEN IF GPRB DOES NOT APPEAR TO DEFEND ITSELF, THE ICC ARBITRAL PANEL WILL STILL BE ABLE TO HEAR MORRISON-KNUDSEN'S CASE AND REACH A DETERMINATION. IT CAN DO SO BECAUSE THE PARAKOU-MALANVILLE CONSTRUCTION CONTRACT, LIKE MANY OTHER CONSTRUCTION CONTRACTS, GIVES THE ICC JURISDICTION OVER ALL DISPUTES ARISING UNDER THE CONSTRUCTION CONTRACT. THUS THE NONAPPEARANCE BY GPRB BEFORE THE ARBITRAL PANEL WILL NOT PREVENT THE PANEL FROM GIVING AN AWARD OF UNCLASSIFIED

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MONEY TO MORRISON-KNUDSEN.

4. MORRISON-KNUDSEN HAS OPIC POLITICAL RISK INSURANCE COVERING ITS CONSTRUCTION CONTRACT WORK. THE INSURANCE CONTRACT SPECIFIES CERTAIN BASES UPON WHICH A CLAIM CAN BE MADE TO OPIC, INCLUDING THE FAILURE OF THE GPRB TO PAY AN AWARD RENDERED BY AN ARBITRATION PROCEEDING HELD IN ACCORDANCE WITH THE PROVISIONS OF THE PARAKOU-MALANVILLE CONSTRUCTION CONTRACT. IF GPRB FAILS TO PAY AN AWARD OF MONEY WITHIN SIX MONTHS AFTER RENDERED BY THE ARBITRAL PANEL, MORRISON-KNUDSEN CAN MAKE A CLAIM FOR SUCH AWARD WITH OPIC. IF A CLAIM IS MADE, OPIC WILL HAVE TO DETERMINE IF IT IS LIABLE UNDER THE INSURANCE CONTRACT. IN MAKING ITS DETERMINATION, OPIC CANNOT REOPEN THE MERITS OF THE DECISION OF THE ARBITRAL PANEL. THE ONLY SUBSTANTIVE QUESTION FOR OPIC WOULD BE WHETHER THE DISPUTE RESOLUTION MECHANISM SPECIFIED IN THE CONSTRUCTION CONTRACT WAS PROPERLY FOLLOWED BY MORRISON-KNUDSEN. IF OPIC WERE TO DETERMINE THAT IT WAS LIABLE TO MORRISON-KNUDSEN UNDER THE INSURANCE CONTRACT AND PAY COMPENSATION, OPIC WOULD SUCCEED TO MORRISON-KNUDSEN'S CLAIM AGAINST GPRB FOR THE MONEY AWARD OF THE ARBITRAL PANEL.

5. THE AGREEMENT BETWEEN THE USA AND BENIN ON THE SUBJECT OF INVESTMENT GUARANTIES (NOW REFERRED TO AS INSURANCE)

SIGNED AT COTONOU MARCH 8 AND 13, 1965 RECOGNIZES THE RIGHT OF THE USG TO SUCCEED TO ANY CLAIMS IT RECEIVES UPON PAYMENT TO AN INSURED INVESTOR UNDER AN INSURANCE CONTRACT. THIS AGREEMENT ALSO PROVIDES FOR NEGOTIATION BETWEEN THE USG AND GPRB WITH RESPECT TO ANY CLAIM TO WHICH THE USG MAY SUCCEED. IF SUCH NEGOTIATIONS ARE NOT SUCCESSFUL, EITHER THE USG OR GPRB CAN REQUEST INTERNATIONAL ARBITRATION. THUS ANY CLAIM ASSIGNED TO OPIC BY MORRISON-KNUDSEN UNDER THE INSURANCE CONTRACT WOULD BE COVERED BY THE PROVISIONS OF THE FOREGOING AGREEMENT.
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6. EMBASSY IS ADVISED THAT THE NUMBER OF IRREVERSIBLE EVENTS COULD OCCUR IN THE NEXT FEW MONTHS INCLUDING (A) GPRB IS ABOUT TO LOSE THE RIGHT TO APPOINT AN ARBITRATOR TO THE ARBITRAL PANEL, (B) GPRB WILL HAVE TO PREPARE ITS CASE FOR THE ARBITRAL PANEL, (C) IF GPRB DOES NOT PARTICIPATE AND PRESENT ITS REBUTTAL TO THE MORRISON-KNUDSEN CLAIM, THERE IS AN INCREASED LIKELIHOOD THAT THE ARBITRAL PANEL WOULD RENDER A DECISION ADVERSE TO GPRB, (D) IF THE PANEL GIVES AN AWARD IN FAVOR OF MORRISON-KNUDSEN AND GPRB DOES NOT PAY, MORRISON-KNUDSEN WILL SUBMIT A CLAIM TO OPIC UNDER THE INSURANCE POLICY, (E) IF OPIC DETERMINES IT IS LIABLE UNDER THE INSURANCE CONTRACT FOR THE FAILURE OF GPRB TO PAY AN AWARD AND SUBSEQUENTLY PAYS COMPENSATION TO MORRISON-KNUDSEN, OPIC WILL SUCCEED TO THE RIGHT TO RECEIVE PAYMENT OF THE AWARD OF MONEY FROM GPRB, (F) ONCE OPIC PAYS COMPENSATION, OPIC WOULD HAVE TO FOLLOW ITS STATUTORY OBLIGATION TO PURSUE THE CLAIM AGAINST GPRB WHICH IS ASSIGNED TO OPIC, AND (G) SINCE OPIC IS A USG AGENCY, THE USG COULD INVOKE ITS RIGHTS UNDER THE USG-GPRB 1965 AGREEMENT.

7. BEFORE THE FOREGOING EVENTS OCCUR, OPIC REQUESTS EMBASSY TO ASCERTAIN GPRB RESPONSE TO DIPLOMATIC NOTE AND TO ADVISE APPROPRIATE GPRB OFFICIALS AT THE HIGHEST POSSIBLE LEVEL OF THE POTENTIAL CONSEQUENCES OF ITS FAILURE TO PARTICIPATE IN THE ICC ARBITRATION PROCEEDINGS.

8. EMBASSY SHOULD REMIND GPRB THAT (A) THE SETTLEMENT OF DISPUTES PROVISION IN THE PARAKOU-MALANVILLE CONSTRUCTION CONTRACT PERMITS EITHER GPRB OR MORRISON-KNUDSEN TO INVOKE ICC ARBITRATION, (B) SUCH AN ARBITRATION PROVISION IS COMMON TO MAJOR CONSTRUCTION CONTRACTS, (C) THE ICC ARBI-
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TRATION IS THE PROPER FORUM TO DISPOSE OF THE OVERRUN
DISPUTE, (D) SINCE GPRB HAS INFORMED LOCAL REP OF MORRISON-
KNUDSEN THAT CLAIM FOR OVERRUN IS WITHOUT FOUNDATION, IT
IS IN GPRB'S INTEREST TO PARTICIPATE IN THE ARBITRATION
AND PROVE THAT CLAIM IS IN FACT WITHOUT FOUNDATION, (F)
FAILURE OF GPRB TO PARTICIPATE IN ARBITRATION PURSUANT TO

CONSTRUCTION CONTRACT WILL DAMAGE STANDING OF GPRB WITH
PRIVATE CONTRACTORS AND INVESTORS AND WITH CAPITAL EXPORT-
ING NATIONS AND (G) THE SERIES OF UNFORTUNATE EVENTS PRE-
VIOUSLY DESCRIBED COULD OCCUR. VANCE

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